No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

Ann Richards, Governor of Texas; Carol S. Vance, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Clarence N. Stevenson, Allan B. Polunsky, R. H. Duncan, Sr., Gilberto Hinojosa, John R. Ward, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under principles of federalism and Article III of the Constitution, federal courts have jurisdiction to decide unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex regulatory scheme when resolution of the dispute was not necessary to provide relief to the Plaintiff prisoner class in a local jail?

2. Whether a federal court's order, based solely on state law, that the state must compensate one of its political subdivisions is in violation of the Eleventh Amendment when such order is not necessary to provide relief to the prisoner class in a local jail?

3. Whether, under principles of federalism, federal courts should abstain from deciding, or, alternatively, certify to the state supreme court, unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex state regulatory scheme, when federal judicial intervention in the dispute is not necessary to provide relief to the Plaintiff prisoner class in a local jail and a state court proceeding involving identical issues and identical parties is pending?

4. Whether state officials can possess the requisite culpable state of mind to be found liable for unconstitutional conditions in a local jail under *Wilson v. Seiter*, ____ U.S. ____, 111, S.Ct. 2321 (1991), when their state law duty to remedy conditions in a local jail was not clearly established and the finding of liability was "tentative" and "contingent" on the outcome of state court litigation?

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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

ANN RICHARDS, GOVERNOR OF TEXAS, ET AL.,
Petitioners

v.

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.,
Respondents

v.

LAWRENCE R. ALBERTI, ET AL.
Respondents

PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit after remand is attached as Appendix A. *Alberti v. Sheriff of Harris County v. Richards*, 978 F.2d 893 (5th Cir. 1992). The order of the panel denying the State's Motion for Panel Rehearing and Suggestion for Rehearing En Banc is attached as

Appendix B. The initial opinion of the Court of Appeals for the Fifth Circuit reviewing the District Court's orders finding liability against state officials and ordering state officials to compensate Harris County is attached hereto as Appendix C. *Alberti v. Sheriff of Harris County v. Richards*, 937 F.2d 984 (5th Cir. 1991), *cert. denied sub. nom. Richards v. Lindsay*, ____ U.S. ____, 112 S.Ct. 1994 (1992). The order of the panel denying the state's Motion for Panel Rehearing in the initial appeal is attached as Appendix D. The decision of the district court finding State Defendants deliberately indifferent after the initial opinion in the Fifth Circuit is attached as Appendix O. The opinion of the district court initially finding liability is attached as Appendix Y. Other district court opinions ordering the deposit or dispersal of monies to Harris County or denying relief from such orders which are the subject of this petition are attached as Appendices I, J, K, L, M, N, O, P, Q, S and U.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1992. A timely filed Suggestion for Rehearing En Banc and a Motion for Panel Rehearing were denied on January 13, 1993. This Petition for Writ of Certiorari is filed within 90 days of the Final Judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. CONSTITUTIONAL PROVISIONS:

Article III, § 2, cl. 1 in pertinent part:

> The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States . . .

Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or presented against one of the United States by citizens of another state; or by citizens or subjects of any foreign state.

II. STATUTORY PROVISIONS:

Tex. Code Crim. Proc. art. 104.002 in pertinent part:

[A] county is liable for all expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county.

Tex. Gov't Code § 499.071 (formerly Tex. Rev. Civ. Stat. Ann. art. 6166a-4) is attached as Appendix Z.

Tex. Gov't Code § 499.121-499.125 is attached as Appendix AA.

STATEMENT OF THE CASE

I. PETITION INVOLVES FEDERALISM ISSUES OF NATIONAL SIGNIFICANCE AND IS NOW RIPE FOR REVIEW.

This controversy swirls around whether Texas prison officials and the Governor of Texas (hereinafter "State Defendants") bore any liability, especially financial liability, for felons sentenced to the state prison system but confined and maintained in the Harris County jail. State Defendants do not dispute the Fifth Circuit's analysis that this is "*exclusively*" a state law issue and that it presented a "hard question" for the court. Appendix ("App.") C 15. Rather State Defendants maintain that federal courts, especially in a suit between two different levels of state government and involving complex state regulatory policies, lack authority to decide these "hard questions" of "*exclusively*" state law. This is especially so since the dispute involved primarily the fiscal question of compensation to the counties which should only have been resolved on the *terra firma* of Texas politics in the Texas legislature. At the very least, under abstention doctrine, federal courts should have deferred to state courts to avoid decision on the difficult constitutional questions concerning State Defendants' liability under the Eighth Amendment and their immunities under the Eleventh Amendment.

Petitioners recognize they have sought relief or review before this Court on two separate occasions. On March 29, 1991, Justice Scalia stayed the initial order of the district court requiring state officials to reimburse Harris county for cost of transferring to other county jails certain inmates sentenced to Texas prisons. *Richards v. United States District Court for the Southern District of Texas*, ___ U.S. ____, 111 S.Ct. 1409 (1991). The full court subsequently vacated that stay. *Id.* Subsequently, this Court denied certiorari when State Defendants sought precautionary review of the Fifth Circuit's initial decision while the district court's finding of deliberate

indifference was still pending before the Fifth Circuit. *Richards v. Lindsay*, ___ U.S. ___, 112 S.Ct. 1994 (1992).

However, neither this Court's unquestioned discretion to deny extraordinary relief in the context of an interim measure involving the safety and welfare of the inmates in the Harris County Jail nor this Court's wise traditions of justiciability[1] can any longer afford a reasonable basis for denying review of a decision which involves questions of burning importance to the states and our federal system.

Fiscal disputes between different levels of state government should be resolved exclusively by state institutions under our federal system. It is not the proper role of federal courts to permanently resolve perceived gridlocks in state government at the expense of those state institutions. Rather, time and again this court has admonished that these disputes must be resolved delicately with due deference given to state institutions. Most recently in the context of allowing "arms of the state" to take advantage of the collateral order doctrine to appeal a district court order denying an Eleventh Amendment immunity claim, this Court has, with a booming voice, eloquently reafffirmed these principles:

> The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. See *Hans v. Louisiana*, 134 U.S. 1, 13, 10 S.Ct. 504, 506, 33 L.Ed. 843 (1890). It thus accords the States the respect owed them as members of the federation. While application of

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[1] State Defendants' previous Petition for Certiorari, filed as a precautionary measure, could well have been judged premature, since the appeal of the trial court's deliberate indifference finding was still pending before the Fifth Circuit. *See e.g., Brotherhood of Locomotive Fireman and Enginemen v. Bangor and Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967).

> the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated.

P. R. Aqueduct and Sewer Authority v. Metcalf and Eddy, ___ U.S. ___, 113 S.Ct. 684, 689 (1993).

That this case arises in the context of perhaps our greatest national malaise, crimina! justice, only heightens its importance. Litigation concerning prison and local jail overcrowding is tragically chronic in our society. In resolving these cases federal courts must work with and respect state institutions and policies. Under the Constitution, federal judges are not intended to sit as criminal justice czars over state criminal justice institutions defining and, in fact here, redefining state fiscal policy.

For all these reasons this case presents issues of profound importance to the nation.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This case arises from *Lawrence Alberti v. The Sheriff of Harris County*, No. 72-H-1094, Southern District of Texas, a class action suit alleging constitutional violations brought under 42 U.S. § 1983 by prisoners in the Harris County (Houston) jail against the Sheriff of Harris County, certain of his employees and the members of the Harris County Commissioners Court (hereinafter "County Defendants"). County Defendants in early 1989 filed a Third Party complaint against Petitioners herein seeking to have the Texas Department of Corrections ("TDC," now called the Texas Department of Criminal Justice-Institutional Division or "TDCJ-ID") accept inmates sentenced to TDC but awaiting transfer in the Harris County jail. The only

real dispute in this case has been between the State and County Defendants.[2]

On September 25, 1989, the *Alberti* court, determining the merits-liability aspect of the case, found the jail unconstitutional and, on the basis of its interpretation of *state law*, held State and County Defendants jointly liable for its unconstitutionality.[3] On February 7, 1991, the *Alberti* court ordered the transfer to other county jails of certain prisoners who were eligible for transfer to TDCJ-ID. These inmates were to "continue to be Harris County prisoners," but, under the terms of the order, Harris County was to be compensated by State Defendants (at a rate up to $40 per inmate per day) for expenditures incurred as a result of the transfers. App. U 6. The district court went on to rule that in light of the unsettled nature of state law, the assessment of costs was "tentative" and "contingent" upon the outcome of state court litigation. App. U 7.[4]

Upon appeal, a panel of the Fifth Circuit acknowledged that this case presented a "hard question" of "*exclusively*" state law. *Alberti v. Sheriff of Harris County v. Klevenhagen*, 937 F.2d 984, 994 (5th Cir. 1991), *cert. denied sub nom. Richards v.*

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[2] The plaintiff class sued Defendants only *after* the second of two trials on liability and at the suggestion of the *Alberti* court. Transcript, Trial of September 12-15, 1989, vol. 1, pp. 5-11; vol. 4(A), p. 83.

[3] The Fifth Circuit had previously ordered "the transfer, to the judge presiding over the *Ruiz* case [*Ruiz v. Collins*, No. 78-H-987-CA (S.D. Tex., Houston Div.), the state prison conditions case], of so much of the remedy portion of the *Alberti* third-party action . . . as seeks to enjoin them to receive or take prisoners to TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." *In Re Clements*, 881 F.2d 145, 153 (5th Cir. 1989).

[4] In a Memorandum Opinion, the *Ruiz* court indicated it would have abstained on the issue of compensation to Harris County. App.T.

Lindsay, ___ U.S. ___, 112 S. Ct. 1994 (1992) (emphasis on original) (hereinafter "*Alberti I*"), App. C 15. However, despite obvious federalism concerns, rather than abstain to an ongoing state court action or certify to the Texas supreme court (which State Defendants urged), the panel adopted the lower court's methodology concerning liability.

> In sum, state courts should eventually determine whether the state or the county is responsible for ready-felons in the county's jails. The *Alberti* court's assessment of costs was "tentative" and "contingent on . . . the outcome of pending litigation in state courts over the allocation of costs for maintaining felons ready for transfer to the TDCJ-ID in county facilities."

App. C 30. The panel then remanded for consideration of this Court's decision in *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321 (1991). App. C 34.

The lower court held both State and County Defendants deliberately indifferent under *Seiter*. App. O. The same panel affirmed the lower court's ruling, acknowledging, however, some "force" to the argument that State Defendants could not have acted with deliberate indifference in light of the legal uncertainty of their state law duties. *Alberti v. Sheriff of Harris County v. Richards*, 978 F.2d 893 (5th Cir. 1992) (hereinafter "Alberti II"), App. A 4.

To date, federal courts have, without state legislative authorization, required state officials to directly reimburse a political subdivision of the State of Texas for $12,649,874.25 ostensibly as a component of the remedy in this case. App. F, I, J, K, L, M, N, O, P, and U.[5] Moreover, the lower court has

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[5] App. F is the order of November 23, 1992 which was issued after this appeal. State Defendants request the Court to take judicial notice of this order, which State Defendants refer to solely to show the total amount of compensation they have been required to pay to the County.

recently required the state to enact an additional remedial plan costing millions of dollars and has imposed anticipatory "fines" or "sanctions" of $50 per prisoner per day on the state of Texas for every prisoner over the jail cap after March 31, 1993. App. E, G, and H.[6]

State Defendants seek certiorari to challenge the lower court's jurisdiction to decide this dispute, to correct the lower court's misapplication of principles of federalism and to overrule a finding of deliberate indifference under *Seiter* when state law duties establishing the responsibility of a state actor are not clearly established and the liability finding was admittedly "tentative" and "contingent."

III. STATEMENT OF FACTS

The panel acknowledged in *Alberti I* that the threshold question of these state officials' liability for inmates in local jails who were eligible for transfer to state prison rested "*exclusively*" on state law. App. C 15. Thus, the relevant "factual" context here is the context of state law concerning these state officials' duties (if any) toward the transfer-eligible inmates in the Harris County jail. While State Defendants maintain they had no duty to remedy unconstitutional conditions in a local jail at the time of the liability finding here, at the very least any such duty was and still is unsettled and not clearly established.

A. State Law Prior to H.B. 93[7] Was Unsettled as to Liability and Financial Responsibility of

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[6] Although not a subject of this petition, State Defendants ask this Court to take judicial notice of the *Alberti* court's Memorandum Opinion and Final Order of September 29, 1992 attached as App. G and H. App. E is an order of the *Alberti* court of March 24, 1993, which renames the anticipatory fines "remedial sanctions." Although not a subject of this petition, State Defendants also request the Court to take judicial notice of this order.

[7] TEX. GEN. & SPECIAL LAWS 1991, 2d Called Sess., Ch. 10, pp. 180-226 (hereafter, "H.B. 93") (eff. August 29, 1991).

State Defendants for Transfer-Eligible Inmates in Harris County Jail.

It is difficult to seriously contend that state law before August of 1991 was settled as to the responsibility (financial or otherwise) of State Defendants for prisoners in local jails. Two sections of the Local Government Code, TEX. LOCAL GOV'T CODE ANN. §§ 351.001 (Vernon Supp. 1993) and 351.041 (Vernon 1988), vest responsibility for county jails in the county commissioners courts and the sheriffs, respectively. Moreover, prior to August of 1991, state statutory law was unequivocal in making the counties financially responsible for all prisoners in their jails:

> "[A] county is liable for all expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county."

TEX. CODE CRIM. PROC. ANN. art. 104.002 (Vernon Supp. 1993); *see* Op.Atty Gen. JM-743 (1987) (counties, not TDC, are liable for medical expenses of parole violator in TDC's legal custody but confined in county jail), App. BB; Op.Atty Gen. JM-730 (1987) (counties, not TDC, liable for medical expenses of TDC inmates confined in county jail on bench warrant), App. CC. In fact, prior to August 1991, the Texas Legislature had on three occasions failed to pass bills to compensate Texas counties for holding convicted felons, as well as a constitutional amendment and accompanying legislation to require the State to reimburse local governments for any new State mandates. See State Defendants' Exhibits 4-8, introduced at the trial of October 22, 1990 and testimony at that trial transcript [tr.] vol. 1, pp. 122-24. Nor, prior to August 1991, had the legislature appropriated money for compensating the counties for holding such prisoners. *See* TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. Ch. 1263, pp. 5184-5200 (eff. June 16, 1989). The lack of appropriations to compensate the counties is evidence of the intent of the legislature, *see Bullock v. Calvert*, 480 S.W.2d 367, 371 (Tex. 1972); TEX. CONST., Art. VIII, § 6 (funds may not

be drawn from the State treasury without a specific appropriation therefor). Under the State constitution, the legislature has plenary power over the counties. *See* TEX. CONST., Art. IX, § 1; *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915, 919-20 (1925); *Bass v. Fontleroy*, 11 Tex. 698, 706 (1854).

While the district court attributed the unconstitutional conditions in the Harris County jail to a failure of TDCJ-ID to meet a state-law duty to accept inmates sentenced to it, *see* App. Y 21, state law is explicit and abundantly clear that the state prison system has a duty to accept inmates "only" pursuant to former Tex. Rev. Civ. Stat. Ann. art. 6166a-4, which requires the Texas Board of Criminal Justice to "develop, adopt and enforce an allocation formula' that allocates admissions to TDCJ-ID.[8] TEX. GOV'T CODE ANN. § 499.121 (Vernon Supp. 1993). In fact, repeatedly the district court ordered the State Defendants to "maintain" the allocation formula, App. U 8, App. V 3, and App. W 3-4.

B. Allocation Formula was Lynchpin of Reforms Aimed at Controlling Local Jail and Prison Overcrowding.

The allocation formula was a component of H.B. 2335, the Comprehensive Criminal Justice Reform Act, TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. Ch. 785, pp. 3471-3558 (generally eff. September 1, 1989). State Defendants have long maintained -- and the legislative history shows -- that H.B. 2335's primary purpose was to establish a system of financial incentives and disincentives directed at controlling front-end popu-

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[8] Former article 6166a-4 is now codified as TEX. GOV'T CODE ANN. § 499.071 (Vernon Supp. 1993), App. Z. The allocation formula regulation that it mandates is codified as Chapter 152 in Title 37 of the Texas Administrative Code (37 TAC §§ 152.1-152.3). App. DD. Under the current formula, Harris County is allocated 20.6961% of total weekly admissions to the state prison. *See* 17 Tex. Reg. 6788 (October 2, 1992).

lation pressures by providing state financing for sentencing alternatives while at the same time forcing local governments to fund the cost of their own transfer-eligible inmates.[9] State Defendants' Exhibit 49, trial of the week of August 14, 1989, the Report of the Texas House Appropriations Subcommittee on Prison Construction Alternatives (January 30, 1989), esp. at 10 (noting that the state of Texas should develop "a hard core bed allocation system for local governments" and "a system to discourage local governments from sending criminals to the hard-core beds owned and operated by the state . . . beyond the allocation system"). Thus, the Report of the *Alberti* Special Master aptly summarized H.B. 2335 by saying at 4 that it "institutionalized the allocation formula, with its explicit cap on admissions to TDCJ, and encouraged the development within the counties of a wide range of both institutional and community based alternatives to incarceration for a broad class of sentenced felons convicted of essentially non-violent offenses."

It must be noted that State Defendants have consistently and persistently maintained that Harris County underutilizes intermediate sanctions and takes a disproportionate number of state prison beds. *See*, trial of week of August 14, 1989, tr. vol.

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[9] Texas has, of course, also maintained an aggressive prison construction program that is almost unprecedented in scope: "Since 1984, the State has brought 22,299 new prison beds on line, 13,270 of them in 1989 and 1990. In 1989, the State further committed itself to the construction of 15,550 more beds. . ." *See* Report of December 13, 1991 by the *Alberti* Special Master on Harris County sentencing practices (hereinafter "Report of *Alberti* Special Master," copies lodged with Clerk of the Court) at 3. In addition, H.B. 93, Sec. 22.03, p. 224, appropriated $672,100,000 for the construction of 25,000 additional beds, and S.B. 171, passed by the 73rd Texas Legislature (eff. February 23, 1993), appropriated $250.8 million, which TDCJ plans to use in part to construct and operate 10,000 "state jail" beds. (See copies of S.B. 171 and State Defendants' Motion to Modify Final Order or, in the Alternative, to Stay the Imposition of Fines, lodged with the Clerk of the Court. State Defendants request the Court to take judicial notice of these documents.) This makes a grand total of 72,849 beds either built or funded for construction since 1984.

3, pp. 534-572.[10] The Report of the *Alberti* Special Master on Harris County's sentencing practices has confirmed this. (*See* copies lodged with the Clerk of the Court.) Especially in light of these facts, State Defendants have contended that the allocation formula should not have been overridden, so that it would have had its natural effect of encouraging the use of sentencing alternatives in Harris County, as the Texas legislature intended.

C. The State District Court Judgment Relied on By the Fifth Circuit Has Been Vacated Without Ever Being Reviewed, Let Alone Affirmed, by a State Appellate Court.

Both the panel and the district court sought to resolve these complex issues of state law by reliance on an act passed in 1989[11] resting "primary responsibility" in TDCJ for the "confinement, supervision and rehabilitation of felons." *Alberti I*, App. C 21. In doing so, the panel noted its reliance on the only state district court to have addressed the issue. *Id.*

However, the state cases[12] raised not only complicated issues of state court jurisdiction and complex factual issues but overarching separation of powers issues under Article II § 1 of the Texas Constitution.[13] Moreover, under state law, because

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[10] *See also* Affidavit of Steve Martin (with summary) concerning the Harris County criminal justice system, admitted into evidence at the trial of February 27, 1990 as part of State Defendants' Exhibit 17 (copies lodged with the clerk of the Court).

[11] Now codified as TEX. GOV'T CODE ANN. § 493.001 (Vernon Supp. 1993).

[12] *County of Nueces v. Texas Board of Corrections*, No. 451,071 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, pending); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis County, 126th Judicial District of Texas, pending). Both of these were decided by the same state district court judge.

[13] State Defendants have lodged with the Clerk of the Court copies of their appellate brief in *Texas Board of Criminal Justice, et al. v. Nueces*

state entities were involved, the state court judgment on appeal (*Nueces County*), was superseded or automatically stayed. *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 481-82 (Tex. 1964). Before the state court case could be argued, let alone decided on appeal, the counties involved, including Harris County, agreed to vacate their judgments and settle pursuant to H.B. 93. App. EE, FF and GG. *No state appellate court, let alone the Texas supreme court, has ever ruled on the state law issues presented to and decided by the Fifth Circuit.* Indeed, plaintiffs recognized the lack of certainty in state law when they vigorously urged certification to the Texas Supreme Court in the Fifth Circuit. See Plaintiffs'-Appellees' Brief in *Alberti v. Sheriff of Harris County v. Richards*, Fifth Cir. Nos. 91-2274, 91-2210, 90-6034, 90-2441 at 65-72. App. HH.

D. The Legislative History of H.B. 93 and State Court Settlements Indicate the State Was Responsible for Prisoner Transfers Only After October 1, 1991.

After intense lobbying by Texas counties, the Texas Legislature in August, 1991 passed H.B. 93, a law which provides for compensation to the counties for housing inmates sentenced to TDCJ-ID at amounts specifically set by the Legislature. TEX. GOV'T CODE ANN. §§ 499.122-125 (Vernon Supp. 1993), App. AA 2-6. Moreover, as of October 1, 1991 a mechanism was established for transferring, at state expense, inmates to other county jails when a county jail has been declared unconstitutionally overcrowded and over 20 percent of its population is made up of inmates awaiting transfer to TDCJ-ID. TEX. GOV'T CODE ANN. § 499.125 (Vernon Supp. 1993) App. AA 4-5. The legislative history of H.B. 93 indicates that an earlier version of H.B. 93 contained a provision that would have allowed compensation for transferred inmates under state law from February 7, 1991, the date of the *Alberti*

County, et al. No. 3-90-282-CV (3rd Court of Appeals-Austin, Texas) (now dismissed).

court's original order. S.B. 24 (introduced in the First Called Session, 1991), unapproved Conference Committee Report, § 14.02, p. 34, proposing Tex. Gov't Code § 499.123(b). *See* App. II. That provision was dropped in H.B. 93, indicating that the Legislature's intent was not to compensate Harris County prior to October 1, 1991. *Smith v. Baldwin*, 611 S.W.2d 611, 616-17 (Tex. 1981).

E. County Had Full Authority and Ability to Provide Remedy to Inmate Class.

It is indisputable that the County had and still has full authority under Texas law to contract with other counties and transfer prisoners out of its jail to detention facilities in those counties. TEX. GOV'T CODE ANN. Ch. 791 (Vernon Pamph. 1993); esp. TEX. GOV'T CODE ANN. § 791.003(3)(A) (Vernon Pamph. 1993); TEX. LOCAL GOV'T CODE §§ 351.031-351.035 (Vernon 1988); Ch. 351, Subch. F & G (Vernon Supp. 1993); *see also* TEX. GOV'T CODE § 511.012(b) & (c) (Vernon 1990). Nor has there been any contention that the County lacked the financial resources to have made the contracts.

REASONS FOR GRANTING THE WRIT

I. THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

A. Certiorari Should Be Granted To Resolve An Irreconcilable Conflict Between The Circuits Over (1) The Role of Federal Courts In Deciding Disputes Between Different Levels of State Government And (2) The Scope of the Eleventh Amendment.

This case arose in the context of an internal political dispute between the Texas legislature and the counties of Texas over whether counties should be compensated for housing

inmates ready for transfer to the state prison system. Prior to the passage of H.B. 93, that debate raged in the Texas legislature, often between representatives of the state's rural and urban counties:

> Without reducing to a disagreement between you and I individually, kind of globally the problem with that is, you have judges in Harris County that are making decisions that raise my taxes, as he indicated earlier. And we've gone to an extensive amount of time and trouble to try to establish this. Harris County has about 19[14] percent of the State's population, produces about 20 percent of the State's tax revenue stream. It consumes 28 to 30 percent of the prison resources.
>
> When your locally elected judge in Harris County makes a decision about what to do with the criminal, in excess of that 20 percent, taxes in Dallas and Bexar and Parker County go up to pay for that decision . . .

Meeting of the Appropriations Committee of the Texas House on February 21, 1991, Remarks by Representative Ric Williamson of Parker County (Weatherford) in colloquy with Representative Paul Hilbert from Harris County (Houston) (transcript of remarks lodged with the Clerk of the Court).

The Fifth Circuit showed no hesitancy to intrude directly into the center of this political dispute, likening its orders to a "lion in the street" when the Texas legislature passed H.B. 93 in August, 1991. App. D 3. And, *after* deciding the "hard questions" of "*exclusively*" state law against Texas, the Fifth Circuit found the state to be a constitutional violator, thereby sidestepping, without discussion, its authority to decide the

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[14] The evidence in this case indicates 16 percent. See Affidavit of Steve Martin (lodged with the clerk of the Court) at 22.

state-law dispute in the first place. App. C 29. This merely begs the question: Did the Fifth Circuit have authority under Article III[15] and principles of federalism to decide a state-law dispute between two state governmental entities?

In contrast to the Fifth Circuit's approach -- headlong into the melee -- the Sixth Circuit has ruled under principles of federalism that federal courts lack authority "to adjudicate an internal dispute between a local governmental entity and the very state that created it." *Kelly v. Metropolitan Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee*, 836 F.2d 986, 998 (6th Cir. 1987), *cert denied*, 487 U.S. 1206 (1988). And, again in contrast to the Fifth Circuit's approach, numerous decisions of this Court and the Circuit courts have ruled that local governmental entities lack standing to bring an action in federal court against their creator.[16]

The reasoning of the Sixth Circuit rests primarily on a prudent and pragmatic deference[17] to state governments in finding their own means of funding a remedy when a constitutional violation occurs:

> Again, however, the existence of a duty to eliminate [the constitutional violation] does not mean that the duty may only be discharged through taxes levied by the state, as opposed to

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[15] If Congress cannot tell a state where to locate her capital, how, under Article III, can a federal court tell a state that it must compensate its counties? *See Coyle v. Smith*, 221 U.S. 559 (1911); *see also Presley v. Etowah County Comm'n*, ___ U.S. ___, 112 S.Ct. 820, 832 (1992).

[16] *E.g., Coleman v. Miller*, 307 U.S. 433, 441 (1939); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984) (and cases cited therein).

[17] State Defendants maintain, of course, that this deference is anchored in the Constitution, including the Tenth and Eleventh Amendments.

> taxes levied by the counties of the state. This "constitutional wrongdoers must pay for their wrongs" argument has little or no force where we are talking about two political entities, a state and one of its subdivisions, each of which has done wrong (as have subdivisions not now before us) and where the men and women representing the electorate of the state as a whole -- an electorate that includes the voters of all subdivisions -- have chosen not to enact legislation shifting to the state as a whole the costs of repairing the wrongs within each subdivision.

Kelly, 836 F.2d at 998. In fact, this Court has traditionally shown great deference to the states in regards to issues that involve statewide systems relating to the fundamental structure of the state's fiscal and taxing policies, public administration and local initiative. *See e.g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-41 (1973). *Kelly* relied on *Rodriguez* heavily in its reasoning. *Kelly*, *supra* at 996-997.

Yet here, without authoritative state court interpretation, federal courts construed a provision of state law vaguely ascribing "primary responsibility" for felons to TDCJ[18] as carte blanche authority to force state taxpayers to acquire a special prison system for one locality, despite that locality's disproportionate use of state prison space. This federally ordered, but state financed, capacity acquisition required expenditures beyond the funding appropriated by the Texas legislature for construction and acquisition of prison capacity. This is simply not the office of federal courts:

> Such fundamental decisions as how many prisons to build and how large to build them -- basic decisions regarding the allocation of public

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[18] Now codified as TEX. GOV'T CODE ANN. § 493.001 (Vernon Supp. 1993).

> resources are simply outside the domain of federal courts.

Inmates of Occoquan v. Barry, 844 F.2d 828, 843 (D.C. Cir. 1988).

Similarly, the Fifth Circuit's willingness to enter into the fray and decide "hard questions" of "*exclusively*" state law against the State Defendants led it to conclude that the money payments to the County were incidental to injunctive relief. App. C 29. Bootstrapping again its state law decision, it sought to distinguish *Kelly* by ruling that the state was a "current constitutional violator." App. C 29. But as noted above, this distinction begs the question. *Kelly* rests primarily on the proposition that it is not the province of federal courts to decide at all a state-law dispute between different state subdivisions, which the Fifth Circuit here necessarily had to decide first in order to conclude that the State is a "current constitutional violator." Rather, relying on *Rodriguez*, *Kelly* would leave such matters to the state political process, *Kelly*, *supra* at 996-997, and not engage in an "'end-run around the . . . legislature's allocation of state funds'." *Kelly*, *supra* at 995 *citing United States v. Texas Education Agency*, 790 F.2d 1262, 1265 (5th Cir. 1986), *cert. denied sub nom. Lubbock I.S.D. v. Texas Edcuation Agency*, 479 U.S. 1030 (1987).

Accordingly, *Kelly* found, under Eleventh Amendment analysis, that "[t]he order to pay is ancillary only to itself," *Kelly*, *supra* at 992, and, as such, violated settled precedents holding that, "[w]hen the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Kelly*, *supra* at 988-89 citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945); *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984). This in turn is consistent with long-standing case law counseling, under Eleventh Amendment analysis, non-

interference with the fiscal affairs of states. *See e.g., Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946).

The reasoning of the *Kelly* case applies with particular force where, as here, vindication of the constitutional rights of the Plaintiffs could have been achieved without involving the state at all, while leaving the local governmental entity free to pursue its relief before the state legislature or in state court.

> It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states. "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that *such relief should be denied in every case where the asserted federal right may be preserved without it."*

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943), *quoting Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). (emphasis added)

Especially in an era of tightening budgets, the role of federal courts in resolving fiscal disputes between different levels of state government raises fundamental questions of federalism. Hence, the irreconcilable conflict between the Fifth Circuit and other circuits as to how to approach this problem is important, and this Court should resolve it.

B. Certiorari Should Be Granted Because of The Lower Court's Clearly Erroneous And Ill-Reasoned Ruling on Abstention and Certification.

1. Abstention Was Especially Appropriate Because of Ongoing State Court Proceedings Dealing With Undecided Issues of State Law.

Few cases cry out so much as this one for some principled discussion of federalism, particularly this Court's decision in *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). Although acknowledging that this case presented a "hard question" of "*exclusively*" state law, App. C 15, the panel was simply flat-footed on abstention, noting only that it did not "quite fit", App. C 30, despite this Court's clear message that such stingy judicial "pigeonholing" is not appropriate in abstention analysis. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987). Judge Higginbotham, no novice at federalism, has himself noted, in a case which formed the gravamen of his analysis here, that if there is "real ambiguity" about statutory intent or state law, "strong" grounds for *Pullman* abstention exist. *Bush v. Viterna*, 795 F.2d 1203, 1205 n.1 (5th Cir. 1986).

There can be little question, especially in light of H.B. 2335 and the allocation formula, that at the very least there was "real ambiguity" as to whether or not the intent of state law was for TDCJ-ID or other state entities to assume responsibility for transfer-eligible inmates in local jails prior to the passage of H.B. 93. Certainly, given the stakes of the state law dispute in terms of the state's criminal justice policies, its relationship with its counties[19] and the obvious fiscal implications for the state,

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[19] Even assuming *arguendo* federal courts have authority to resolve a state law dispute between two state governmental entities, abstention would still seem the better course. Deference to state institutions is especially appropriate, "when it is proposed that the remedial powers of the federal courts be exercised 'to restructure the operation of local and state governmental entities.'" *Kelley*, 836 F.2d at 1000, *citing Hills v. Gautreaux*, 425 U.S. 284, 293, (1976). *See also Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs").

abstention under *Pullman* was appropriate.[20]

The argument for abstention is especially compelling in light of the pendency of a state court action involving the identical state and county parties. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Younger v. Harris*, 401 U.S. 37 (1971). In fact, "wise judicial administration" would have counseled in favor of dismissing State Defendants to conserve the resources of the courts and the parties. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976).

The Fifth Circuit's "deference" to these ongoing state court proceedings and the district court's "contingent" enforcement of its orders, *see* App. C 21-22, U 7, are a far cry from the considerations of federalism embodied in the abstention doctrine. Here those state court proceedings had either been "superseded" or stayed on appeal[21] (as in *County of Nueces*) or had not even been fully litigated in the trial court. Litigants should not be able to use a federal court to make an end run around normal state judicial processes. *See Pennzoil*, 481 U.S. esp. at 13-14. Nor should they disrupt the ordinary process of trial or appeal in state court by adjudicating a civil rights case in which the federal

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[20] Because this is a Texas case, the proper course was to dismiss State Defendants or at least any claims relating to State Defendants' liability and financial responsibility for transfer-eligible inmates in the Harris County jail. *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 88-89 (1975).

[21] The basis for the automatic stay on appeal was precisely because the judgment was against a state entity and issues of sovereign immunity were implicated. *Ammex*, 381 S.W.2d at 481-82. Given this Court's decision in *Pennhurst*, it would have seemed particularly advisable under the Eleventh Amendment to have deferred to the normal state practice set forth in *Ammex*. *Cf. Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989) (considerations based on the Eleventh Amendment can be applied in other contexts involving the constitutional balance between states and the federal government). Non-interference with the stay and normal state court process was also mandated by 28 U.S.C. § 2283.

constitutional claims are "inextricably intertwined with the state court's grant or denial of relief." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-84 n.16 (1983).

Moreover, the whole idea of "contingent" liability raises the very justiciability problem which the *Pullman* doctrine was designed to avoid:

> When federal courts interpret state statutes in a way that raises federal constitutional questions, "a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless."

Pennzoil, 481 U.S. at 11, *citing Moore v. Sims*, 442 U.S. 415, 428 (1979). And here that prophecy has been sadly fulfilled, for the entire state-law basis of the Fifth Circuit's opinion has evaporated with the vacation of the judgments in state court pursuant to the settlement of the state court actions under H.B. 93.

2. Abstention was Appropriate to Avoid Disruption of State Regulatory Programs.

The lower courts' assumption of jurisdiction over the claims against State Defendants also violated the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), which calls for abstention when such jurisdiction interferes with a complex state regulatory scheme. *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. at 814 (federal courts must abstain to avoid adjudication that would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern").

Requiring State Defendants to finance the housing of transfer-eligible inmates in other counties implicated (and, in fact, undermined), the important public policy objectives of the allocation formula under H.B. 2335 by *de facto* giving Harris County additional numbers above its current allocation.[22] It also went at cross-purposes to the manifest intent of H.B. 2335 to encourage the use of intermediate sanctions and alternatives to incarceration because it removed from Harris County the financial burden of supporting inmates sentenced to state prison in excess of Harris County's allocation.[23]

In fact, the entire process of federal review in this case involves consideration of a wide variety of public policy decisions in the Texas criminal justice system which are discretionary in nature. These include (but are not limited to) how many prison beds to construct, how many to contract for, how much good time to award (either under the Prison [or Population] Management Act [PMA],[24] or by prison officials), or how many

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[22] The allocation formula is, of course, subject to state court judicial review under the Texas Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a § 12 (Vernon Pamph. 1993).

[23] In addition, requiring State Defendants to pay the costs of contracts with private vendors or counties for jail space interfered with or superseded the bidding process for such contracts required by TEX. GOV'T CODE § 495.003 (Vernon Supp. 1993).

Moreover, the order circumvented the 1987 Appropriations Act which limited the number of beds that the State could contract out for under former article 6166g-2 (Vernon's Texas Civil Statutes) to 2,000. TEX. GEN. & SPECIAL LAWS 1987, 2d Called Sess., Ch. 78, paragraph 49, p. 343 (eff. August 6, 1987). Before H.B. 93, there were no additional appropriations to allow the TDCJ-ID to contract out for more beds, nor any change in the 1987 rider limiting the number of beds. And as the testimony showed at the hearing in this case of the week of August 14, 1989, TDCJ-ID had already contracted out for all 2,000 beds. See tr. vol 4, pp. 674 & 746.

[24] TEX. GOV'T CODE ANN. Ch. 499, Subch. B (Vernon Supp. 1993). The PMA was itself the subject of a state constitutional attack in Texas courts. *See* Appellants' Brief in *County of Nueces* case (lodged with the Clerk of the Court) at pp. 37-38.

inmates to furlough. These discretionary decisions were all the subject of state court review in both the *Nueces* and *Harris* county actions. And all of these functions and decisions implicate matters of substantial public concern and involve an attempt to maintain a coherent, state-wide criminal justice policy. Federal courts, accordingly, should have refrained from reviewing these issues under a hybrid *Burford-Younger* type of abstention. *Cf. Pennzoil*, 481 U.S. at 11-12 and 15-17 (justifying abstention in light of Art. I, § 13 of the Texas Constitution, the "open courts" provision).

3. If Abstention Was Not Appropriate, the Fifth Circuit Should Have Stayed Further Action Against State Defendants While Certifying the Relevant Questions of Law to the Texas Supreme Court.

Certainly, if abstention for some reason was not appropriate, the Fifth Circuit should have certified the relevant questions concerning the State's liabilities and financial responsibility to the Texas Supreme Court in accordance with TEX. R. APP. P. 114. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (certification appropriate in light of the "great unsettlement" of state law). Certification may also be the most appropriate course now to resolve any remaining dispute about the respective duties of the state and county actors, in light of the settlement of the state court lawsuits and the accompanying changes in state law. *See State of Louisiana ex rel. Guste v. Roemer*, 949 F.2d 145 (5th Cir. 1991) (certifying to Louisiana supreme court question relating to dispute between Governor and Attorney General over who had authority and responsibility to represent state in litigation concerning higher education system). While these State Defendants cannot be held liable for the alleged past actions or omissions at issue here, given the uncertainty of their responsibilities under state law (see *infra* at 26-28), certification would serve to clarify once and for all the respective present and future duties of the state and county

actors. If any of those actors then failed to fulfill their duties, the plaintiffs would be entitled to pursue a remedy against them.

C. Certiorari Should Be Granted To Determine Whether State Officials Can Be Found Liable For Conditions In A Local Jail Under *Wilson v. Seiter* When Their Responsibilities Under State Law For Inmates in A Local Jail Are Not Clearly Established.

Relying on individual liability cases, the Court in *Wilson v. Seiter* mandated an "inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." *Seiter*, ___ U.S. at ___, 111 S. Ct. at 2324. Here, the threshold question of which official, state or county, was responsible for conditions in the local jail presented a "hard question" of "*exclusively*" state law. App. C 15 (emphasis in original). The panel correctly ruled that under Texas law "[t]he county clearly has some responsibility for conditions in the county's jails."[25] *Id.* It then went on to resolve the "hard question" of the liability of state officials on a "tentative" and "contingent" basis, pending the outcome of state court litigation. However, it is difficult to square the Court's reasoning with the requirement of a mental element under *Wilson v. Seiter*. If state law presented a "hard question" as to the responsibility of the state officials sued here for conditions in the local jail, those officials could certainly in good faith maintain the position that they had no such responsibility. Maintaining a defensible legal position on a "hard question" of state law shows no evidence of the culpable mental state required under *Seiter*.[26]

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[25] As previously noted, the County had full authority and ability to provide a remedy to the inmate class in the Harris County Jail. *See supra* at 15.

[26] State Defendants maintain that given their overriding concern for public safety and the prevention of early releases, their obligations to other counties in Texas to take their fair share of inmates under the allocation formula and the requirements of *Ruiz v. Collins* [state prison conditions case, see *supra* at 7 n.3, they should be held to the standard of "malicious or

This can clearly be seen through analogy to the law of individual immunities. State officials sued in their individual capacity cannot be held liable unless their duties were "clearly established" or readily "apparent." *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *also Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Certainly under *Seiter* the principles applicable to good faith immunity in an individual liability case are analogous to the analysis of whether officials have been "deliberately indifferent" or "malicious and sadistic" in a prison conditions case. In this connection, this Court clearly relied on *Estelle v. Gamble*, 429 U.S. 97 (1976); *Whitley v. Albers*, 475 U.S. 312, 317 (1986); and *LaFaut v. Smith*, 834 F.2d 389, 395 (4th Cir. 1987) individual liability cases, in formulating the "culpable mental state" requirement of *Seiter*. *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2323, 2326-27. Moreover, only weeks ago, this Court analogized directly to cases allowing interlocutory appeals for claims of individual immunity in ruling that "the same rationale ought to apply to claims of Eleventh Amendment immunity made by the States and state entities possessing a claim to share in that immunity. . ." *P. R. Aqueduct & Sewer Authority v. Metcalf & Eddy*, ___U.S. at ___, 113 S.Ct. at 687.

State Defendants, of course, are not contending that state officials are entitled to individual immunities when sued in their official capacity. *Hafer v. Melo*, ___ U.S. ___, 112 S.Ct. 358, 362 (1991). *Hafer* made it clear that "the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses." *Hafer*, ___ U.S. at ___, 112 S.Ct. at 362.

On the other hand, State Defendants do maintain that state officials acting in their official capacity should be entitled,

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sadistic" intent under *Seiter*. *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. However, under whatever standard imposed under *Seiter*, State Defendants cannot be liable when their underlying state law duties are not clearly established.

as *an incident of the State's Eleventh Amendment immunity*, to a rule assuring them that any *state law* duties which a federal court might construe in the context of a civil rights claim will be clearly established. Otherwise, a federal court could improperly interpret state law and wrongly intrude into state structures and fiscal policy. Hence, especially when state law is unclear, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106.[27]

State Defendants maintain that by analogy to *Harlow* and *Creighton*, and especially in light of *Pennhurst*, until State courts had authoritatively construed their State-law duties, they were entitled to stand on their defense in federal court that they had no duty to inspect the Harris County jail and no duty to fix it. And with the vacation of the State court judgments pursuant to H.B. 93, no Texas district court, let alone an appellate court or the Texas supreme court, has entered a final judgment ruling otherwise. Particularly under these circumstances, it is inappropriate for federal courts to construe unsettled state law, *cf. Pennhurst*, 465 U.S. at 106, let alone rule that state officials were deliberately indifferent to any alleged state law duties.

Because this case involves core fiscal issues in the Texas criminal justice system, the scope of the intrusion on the State of Texas' basic structures and institutions in itself clearly warrants *certiorari*, under fundamental principles of federalism. And because this case arises in the context of jail overcrowding, an area of pervasive litigation in the nation, resolution of the fundamental questions in interpreting *Seiter* presented by this

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[27] These arguments are especially compelling when, as here, there is no state law vesting direct supervisory responsibility in these state officials for conditions in local jails. Absent a showing of direct supervisory responsibility over local jails, state officials should not be held liable for conditions in those jails. *See Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976); *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986) (Texas state officials who set standards for and inspect local jails held not responsible for conditions in local jail).

petition will benefit litigants far beyond the immediate parties to this case.

CONCLUSION

For these reasons, Petitioners request that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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